

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case Nos. A-6267**

**APPEAL OF JOHN AND STEPHANIE HESSE**

**OPINION OF THE BOARD**

(Hearing held November 19, 2008)

(Effective Date of Opinion: January 9, 2009)

Case No. A-6267 is an administrative appeal filed by John W. Hesse, II, Trustee, and Stephanie L. Hesse, Trustee, ("Appellants") charging administrative error on the part of the County's Department of Permitting Services ("DPS") in issuing a Notice of Violation dated July 10, 2008, for installing a generator in violation of the minimum setback requirements in the rear yard of the property located at 19030 Dellabrooke Farm Way, Brookeville, Maryland 20833 (the "Property").

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on the appeal on November 19, 2008. Assistant County Attorney Malcolm Spicer represented Montgomery County. Mark Moran, a Zoning Inspector with DPS, appeared as a witness for the County. Neil Hyman, Esquire, represented the Appellants.

**Decision of the Board:** Administrative appeal **Granted**.

**FINDINGS OF FACT**

**The Board finds by a preponderance of the evidence that:**

1. The Property, known as 19030 Dellabrooke Farm Way, is located in the RNC (Rural Neighborhood Cluster) zone in Brookeville, Maryland. The Property is identified as Lot 15, Block B, in the Dellabrooke Forest subdivision. The Stephanie Lynn Hesse Revocable Trust owns the subject Property.
2. On July 10, 2008,<sup>1</sup> Inspector Mark Moran of DPS issued a Notice of Violation to Stephanie Lynn Hesse, et al., for violating a Montgomery County policy entitled the "Minimum Setback Requirements for Generators" by installing a generator on

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<sup>1</sup> The Notice of Violation was dated July 9, 2008, but was signed and issued on July 10, 2008.

the subject Property in violation of setbacks. The Notice required the property owners to remove the generator from its current location, and comply with setback requirements if the generator is to be placed on the Property. The compliance time was 30 days. See Exhibit 3(a).

3. Susan Scala-Demby, Director of Zoning for DPS, testified for the County. Ms. Scala-Demby testified that the zoning portion of the DPS website includes a link to a diagram entitled "Minimum Setback Requirements for Generators." See Exhibit 5(e). She testified that generators are considered an accessory structure, and that they have to be located in the rear yard if they are freestanding. Ms. Scala-Demby testified that Robin Ferro, a plan specialist with DPS, had prepared the "Minimum Setback Requirements for Generators" diagram on January 4, 2007.<sup>2</sup> Ms. Scala-Demby testified that Exhibit 5(g) indicates that this diagram has been posted on the DPS website since January 4, 2007.

On cross-examination, Ms. Scala-Demby testified that the Zoning Ordinance does not define "accessory structure," but does define "structure." She testified that the Zoning Ordinance does not reference generators, but that Chapter 8 of the County Code ("Buildings") does. When asked how she knew the generator diagram had been posted since January 4, 2007, Ms. Scala-Demby testified that Ms. Ferro keeps a list of what she has the County's IT (Information Technology) Department post on the DPS website, and when. She testified that IT sends an email once the link is posted, and that either she or Ms. Ferro tests those links when they are received. She did not recall whether she had tested the link to the diagram in question, or whether Ms. Ferro had tested it.

4. Mark Moran, an Investigator with DPS, testified that he had received a complaint about the placement of the generator in the rear of the Property on June 25, 2008. He testified that he went to the Property, and took measurements and photographs. He testified that on July 10, 2008, he issued the subject Notice of Violation. He testified that he did not include a copy of the DPS diagram relating to the placement of generators with the NOV, but sent one subsequently.<sup>3</sup> He testified that he was able to access the generator diagram on the DPS webpage at the time he issued the NOV, and that he had discussed the diagram with Mr. Hesse. He testified that he had either told Mr. Hesse where to find the diagram on the website, or had sent him a copy.

Mr. Moran testified that the subject Property is zoned Rural Neighborhood Cluster (RNC), and that the subdivision in which it is located had been built under an optional method of development. He testified that generators are treated as

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<sup>2</sup> Ms. Scala-Demby stated that Ms. Ferro was out of the country on the date of the hearing. Counsel for the County made clear that had Ms. Ferro been available, he would have called her as a witness, but that in her absence, he called Ms. Scala-Demby, who is Ms. Ferro's supervisor.

<sup>3</sup> On cross-examination, Mr. Moran testified that he did not include the diagram with the NOV because he was initially unsure, while at the Property, whether the Property had been developed under the standard or optional method of development, and thus was not sure whether the generator was in violation, or if it was, the extent of the violation. He testified that when he got back to his office, he verified the type of development, and sent the NOV.

accessory structures.<sup>4</sup> He testified that Section 59-C-9.574 of the Zoning Ordinance contains setbacks for accessory structures in the RNC Zone, and that subsection (d)(vii) of that Section makes clear that accessory structures are to be set back five feet from the rear and side lot lines, and 60 feet from the street. He testified that this is consistent with the setbacks of the R-60 zone.

Mr. Moran testified that he took photographs of the subject Property. He testified that the generator is the white object shown in the center of the photo at Exhibit 7(a), and that it is in the rear yard. He testified that he measured the distance from the cabinet of the generator<sup>5</sup> to the rear fence, and that it was 28 inches. He testified that the fence was indicated by Xs as being the property line on Exhibit 5(f). He later clarified that Exhibit 5(f) was submitted in connection with permitting for a pool and deck at the subject Property. He noted that Exhibit 5(f) contains a notation stating "Pool equipment must be 5 feet from lot line." He testified that pool equipment is also considered an accessory structure, and thus is subject to the setbacks at Section 59-C-9.574(d)(vii). See Exhibit 10. Mr. Moran marked the location of the generator in yellow marker on Exhibit 8. Mr. Moran testified that the generator is 80 inches wide, 50 inches tall, and 33 inches deep, with a two inch base protrusion. In response to a Board question, Mr. Moran testified that a generator does not require a building permit, but does require an electrical permit. He testified that the electrical permit for this generator had been finalized. Finally, he testified that no locational plan or zoning review are required for a generator, indicating that setbacks are reviewed when complaints are received.

On cross-examination, Mr. Moran testified that in measuring the 28 inches, he stuck his tape measurer through the fence to the accessory structure (generator). He testified that according to the fence permits on file with DPS, the fence is an inch or two from the rear lot line. Counsel for the Appellants then stated that there is a new fence built on the Property inside the location of the old fence.

When asked on cross-examination why he had crossed out "Montgomery County Code Section" and written in "Policy" on the section of the NOV setting forth the violation, Mr. Moran testified that the County's generator policy is not in the County Code. He testified that DPS would not have given the Appellants a copy of this policy when they applied for their electrical permit. He testified that a person would have to ask the DPS Zoning Desk, check the DPS website, or consult with a land use attorney in order to find out about this policy.

5. Stephanie Hesse testified for the Appellants. Ms. Hesse testified that she and her husband had lived in the Property for a little over a year, and that they had completed a large backyard pool project. She testified that they installed the generator because they lose power frequently,<sup>6</sup> and that their power outages last

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<sup>4</sup> Mr. Moran later testified that a generator is an assembly of materials that falls within the Zoning Ordinance definition of "structure," and is used accessory to the main building. See Exhibit 9. For these reasons, Mr. Moran testified that DPS considers generators to be accessory structures.

<sup>5</sup> Mr. Moran indicated that his measurement was to the cabinet, and not to the pipes or wires.

<sup>6</sup> She testified that they had lost power five times since moving into their house.

a long time. She testified that they have a child with an airway disorder who requires medical equipment, and that their toilets do not work when the power goes out.

Ms. Hesse testified that Bangs Generator Systems applied for the electrical permit for the generator, and that she was familiar with the permit application. See Exhibit 5(a). She testified that the generator was installed, and that after a couple of trench and electrical inspections, the electrical permit was finalized. She testified that she did not recall whether or not the DPS generator diagram had been attached to the NOV, whether it was subsequently mailed to them, or whether DPS had instructed them how to find it on the website.

She testified that they had asked the landscape architect who had done their backyard project to look at the placement of the generator. She testified that he told them there were no requirements as to placement. She testified that before Bangs filed for the electrical permit, in January and February of 2008, she and her husband did a general search on-line for permitting information regarding generators, that they reviewed the DPS website, that they searched the County Code, and that they checked with Park and Planning. She testified that they never came across and did not know of any setback requirements until they received the NOV. She testified that no building permit was required.

Ms. Hesse testified that she and her husband had seen a County car near their Property, and noticed on-line that a complaint had been filed against them. She testified that they called Mark Moran, and that he told them it was a technical violation that he had had trouble finding. She testified that he told them to call Ms. Scala-Demby and see if she could approve it. Ms. Hesse testified that Ms. Scala-Demby declined to do so, and that she told them that the relevant information was posted on the DPS website. Ms. Hesse testified that she told Ms. Scala-Demby that they could not find it, and that Mark Moran then left them a message telling them how to find the generator diagram on the DPS website. In response to further Board inquiry about this, Ms. Hesse testified that there is a direct link to the generator diagram on the DPS zoning page which she had not seen when she looked the first time (after speaking with Ms. Scala-Demby); she testified that the diagram was not there when she had looked previously (in January/February, 2008).

Ms. Hesse testified that the Property is next to a common area. See Exhibit 11. When asked if the fence was built on the property line, Ms. Hesse testified that the fence was built four inches inside of the previous fence line. She testified that the old sprinkler system (which they had since replaced) included sprinkler heads located outside of the fence.

**CONCLUSIONS OF LAW**

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-4.3(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that the Notice of Violation was properly issued.
2. Section 59-C-9.574(d)(vii) of the Zoning Ordinance states that for properties in the RNC Zone developed under the Optional Method of Development, the rear and side yard setbacks for accessory structures must be consistent with the requirements in the R-60 Zone, 5 feet for rear and side yard setbacks and 60 feet from the street.
3. Section 59-A-2.1 of the Zoning Ordinance contains definitions of “structure,” “accessory building,” and “accessory use,” but does not define “accessory structure.” “Structure” is defined in that section as “[a]n assembly of materials forming a construction for occupancy or use including, among others, buildings, stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio and television broadcasting towers, telecommunications facilities, water tanks, trestles, piers, wharves, open sheds, coal bins, shelters, fences, walls signs, power line towers, pipelines, railroad tracks and poles.” The Board notes that this is a very broad definition. The Board finds the testimony of Mr. Moran, that a generator is an assembly of materials forming a construction for occupancy or use, and as such meets the definition of “structure,” persuasive, and thus finds that the generator meets the definition of “structure” set forth in the Zoning Ordinance. The Board further finds that as a structure whose use is subordinate to the main structure on the lot (house), this structure (generator) is an accessory structure, and is subject to the setback requirements for such structures set forth in Section 59-C-9.574(d)(vii).
4. Despite numerous requests from the Board, the Appellants were unable to point to any provision in the County Code which would require the County to provide the public with notice of its policy on Minimum Setbacks for Generators. Thus the Board finds that there is nothing in the County Code which would require such notice. County residents are generally charged with knowing and abiding by County law.
5. That said, the Board finds that the County has not provided persuasive evidence establishing the location of the rear property line relative to the current fence, and that without such evidence, it is impossible to accurately determine whether the generator does or does not meet the five foot setback from that line required for accessory structures by Section 59-C-9.574(d)(vii) of the Zoning Ordinance. The Board notes that Exhibit 5(f), which was relied on by the County to establish that the current rear fence was located on or very close to the rear Property line,

contains a notation that it is “[n]ot to be used for the construction of fences or other improvements.” The Board further notes that Ms. Hesse testified that the site plan (not in evidence) that DPS had on file for a fence permit and that was referenced by Mr. Moran on cross-examination as showing that the fence is located an inch or two from the lot line was for an old fence. Finally, the Board notes that Ms. Hesse testified that sprinkler heads for the Property’s old sprinkler system were located beyond the fenceline, suggesting that the Property extended beyond the fence.

Thus the Board finds that although DPS properly classified this generator as an accessory structure, it improperly issued the subject Notice of Violation because the actual setback of the generator from the rear lot line could not be known or determined from the evidence in the record.

6. In light of the foregoing, the Board finds that the Notice of Violation dated July 10, 2008, which cited the Appellants for the installation of a generator on the subject Property in violation of the County’s policy regarding “Minimum Setback Requirements for Generators,” was improperly issued.
7. The appeal in Cases A-6267 is **GRANTED**.

On a motion by Member David K. Perdue, seconded by Member Walter S. Booth, with Allison Ishihara Fultz, Chair, Catherine G. Titus, Vice Chair, and Member Carolyn J. Shawaker in agreement, the Board voted 5 to 0 to grant the appeal and adopt the following Resolution:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

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Catherine G. Titus  
Vice-Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 9<sup>th</sup> day of January, 2009.

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Katherine Freeman  
Executive Director

**NOTE:**

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.